



Approved For Release 2002/07/02 : CIA-RDP75B00380R000600190082-0

OFFICE OF THE CHIEF OF NAVAL OPERATIONS
WASHINGTON, D.C. 20350

IN REPLY REFER TO

From: Chief of Naval Operations
To: Chief of Legislative Affairs

Subj: Non D/D Item 1225, CIA draft legislation "To amend the National Security Act of 1947, as amended, and for other purposes"

Ref: (a) OLA ltr LA-62:pb of 7 Feb 1974

1. This replies to reference (a), which requested comments and recommendations on a proposed memorandum by the Department of Defense (DoD) General Counsel concerning subject draft legislation.
2. While the overall thrust of the proposed memorandum is concurred in, vigorous exception is taken to a major change that memorandum would suggest in the draft legislation. The basis for and details of this non-concurrence, and recommended changes, are provided below.

a. Subsection (g)(5) of the draft legislation would establish use of the "arbitrary and capricious" standard for the courts to use in judging the reasonableness of classifications. The DoD memorandum is correct in noting that this standard is difficult to apply to factual situations. There has indeed been much controversy over the meaning and use of "arbitrary and capricious" as a standard. But, the suggested alternative in the DoD memorandum would likely be adverse to the Government's interests and to the intended objectives of the draft legislation. The DoD suggestion would unbalance proceedings by forcing the Government, in effect, to prove that the classified information at issue had been validly classified from both procedural and substantive aspects. Executive Order 11652, "Classification and Declassification of National Security Information and Material," is the basic U.S. Government regulation governing classification. A significant portion of that order is devoted to procedural issues of classification: e.g., identification of officials authorized to exercise classification authority, and to downgrade and declassify material; document marking criteria; downgrading and declassification schedules; and exemption authority and criteria. Procedural guidance for the implementation of that order is given by a 17 May 1972 "National Security Council Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information." Those documents have been further implemented within the Department and Defense and the Military Services

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by additional directives. If the legislation were to allow the court to find the classification unreasonable whenever the plaintiffs could establish failure of the Government to comply with any of its own regulations on classifying information, procedural defects on designation of classifying authority or on document marking could cause dismissal of the Government's case without substantive issues ever having been argued. The test in this area should be one which the courts could consistently use in determining the reasonableness of administrative actions on classification. Since the draft legislation can and should be strengthened in this regard, consideration should be given to the following suggested revision of subsection (g)(5), beginning at page 3, line 12 of the draft bill: "...information involved was designated without regard to the impact its disclosure would have on national security or the foreign relations of the United States. In making such determinations, the court shall disregard procedural errors in applying designations which do not affect the substance of the information designated." It is recommended that the proposed DoD memorandum be modified to suggest this as a standard for consideration.

3. The proposed DoD memorandum contains two other sections which, while not specifically non-concurred in, merit further review.

a. Subsection (g)(2) of the draft legislation provides a definition using the phrase "...concerning foreign intelligence..." The concern expressed in the proposed DoD memorandum over the meaning of that phrase appears overstated and is not shared. Since the proposed DoD memorandum has no specific recommendations to make in this regard, consideration should be given to passing by that subsection in silence.

b. Subsection (g)(6) of the draft legislation would authorize the Attorney General to apply for injunctive relief to prevent the commission of the offense which would be created by this bill. Since the contemplated injunction authority would not apply to the press, the relevance of the New York Times case cited in the proposed DoD memorandum is debatable. Moreover, it seems highly questionable to try to anticipate the courts in this area, and to severely weaken the Government's hand to deal with intended unauthorized disclosures of any but the most irreparably damaging nature. Since the wording of the proposed DoD memorandum suggests approval of the standard of "direct, immediate, and irreparable damage to our nation" enunciated by Justice Stewart in the New York Times case, it should be noted that application of that standard to this draft legislation would make it virtually impossible to enjoin the unauthorized disclosure of "Secret" or "Confidential" material. The definitions of those classifications as set forth in Executive Order 11652 do not encompass information meeting Justice Stewart's standard. In view of these factors,

consideration should be given to revising the proposed DoD memorandum so as to take note of potential problems similar to those encountered in the New York Times case, but omitting the gratuitous suggestion of a standard which would excessively restrict the application of the intended injunctive authority.

4. The enactment of the proposed subject legislation is strongly supported.



OFFICE OF LEGISLATIVE AFFAIRS

WASHINGTON, D. C. 20350

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IN REPLY REFER TO

LA-62:pb
CDR Gresens
Ext. 76196
7 FEB 1974

From: Chief of Legislative Affairs
To: OPNAV
MARCORPS
OGC

Subj: Non D/D Item 1225 "To amend the National Security Act of 1947, as amended, and for other purposes."

Ref: (a) OLA ltr LA-62:ms dtd 28 Jan 74 w/encl

Encl: (1) Copy of OSD memo dtd 5 Feb 74 w/encl

1. Reference (a) forwarded subject item for information and study pending submission of the Office of the Secretary of Defense proposed report.
2. The enclosure is referred for comment and recommendation.
3. The views of the addressees listed above should be received in the Office of the Chief of Legislative Affairs by 19 February 1974 in order to be incorporated in the report expressing the position of the Department of the Navy. Addressees are requested to furnish copies of their responses to all action and information addressees.

TEL OP 009

LEGISLATIVE URGENT

John R. Brock
JOHN R. BROCK

Captain, JAGC, U.S. Navy
Director, Legislation

Copy to:
SECNAV
ASN(M&RA)
BUPERS
NAVINTELCOM
NAVCOMMCOM
JAG

1. Submit comments direct to OP-053 1 no later than 19 Feb 74
2. Comment also requested from: _____
3. If further coordination indicated advise EXT 93480

15576



DEPARTMENT OF DEFENSE

Approved For Release 2002/07/02 : CIA-RDP75B00380R000600190082-0
WASHINGTON, D. C. 20301

5 February 1974

MEMORANDUM FOR THE SECRETARY OF THE ARMY

Attention: Chief of Legislative Liaison

THE SECRETARY OF THE NAVY

Attention: Chief of Legislative Affairs

THE SECRETARY OF THE AIR FORCE

Attention: Director, Legislative Liaison

THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

Attention: Administrative Assistant

THE ASSISTANT SECRETARY OF DEFENSE

(Intelligence)

Attention: Executive Director

THE ASSISTANT SECRETARY OF DEFENSE

(Manpower and Reserve Affairs)

THE ASSISTANT SECRETARY OF DEFENSE

(Public Affairs)

THE DEPUTY ASSISTANT SECRETARY OF DEFENSE

(Administration)

DIRECTOR, NATIONAL SECURITY AGENCY

Attention: Counsel

SUBJECT: Non D/D Item 1225, CIA draft legislation "To amend the National Security Act of 1947, as amended, and for other purposes."

Copies of the above subject proposal have been previously circulated by this Office.

Comments of the addressees are requested on the attached draft report not later than February 19, 1974.

Frank J. Sherlock

Director, Legislative Reference Service

STATINTL

SEC. CL.		ORIGIN		CONTROL NO.	
CC				74-1511	
DATE OF DOC	DATE REC'D	DATE OUT	SUSPENSE DATE	CROSS REFERENCE OR POINT OF FILING	
	4 Mar 74				
TO PLC				ROUTING	
FROM				DATE SENT	
SUBJ. Navy Comments on Proposed Legislation "To Amend National Security Act of 1947"					
<p><i>60 Sec. Copy</i></p> <p><i>Adm. Sec.</i></p> <p><i>File to amend NAC to Dec 8 1947</i></p>					
COURIER NO.	ANSWERED	NO REPLY			
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STATINTL